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NO. 20474

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUNE E. BERRY, as the personal
representative of the Estate of
JOHN H. BERRY, deceased,

Appellant,

vs.

PACIFIC SPORTFISHING, INC., A. O.
LEAVITT and F. E. McEWEN, sole
owners of the boat "FISHERMAN",

Appellees.

APPELLANT'S REPLY BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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MARGOLIS and McTERNAN
BEN MARGOLIS
3175 West Sixth Street
Los Angeles, California 90005

Attorneys for Appellant

WILLIAM B. MURRISH,
Of Counsel.

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3175 West Sixth Street
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Attorneys for Appellant

WILLIAM B. MURRISH,
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TOPICAL INDEX

TABLE OF AUTHORITIES

Statute

Rules

California Rules of Court:

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APPELLANT'S REPLY BRIEF

I

APPELLEES HAVE NOT REBUTTED APPELLANT'S CONTENTION THAT ESTOPPEL AROSE AT BAR ON THE PLEADED FACTS OF THE AMENDED CLAIM.

Appellees urge there can be no estoppel at bar because their counsel as attorneys owed no duty to advise appellant, who was the adversary party, as to matters affecting her rights or interests, and because in any event they made no representations to her, and therefore no misrepresentations.

But appellees misconceive what they are charged with and the nature of the duty upon them not to wilfully deceive.

With respect to their pleading in the State Court appellees are charged with intentionally---for the very purpose of achieving a statute of limitations immunity---so casting their answer as to raise only the issues of negligence, contributory negligence and assumption of risk and to conceal and withhold any mention or claim of want of jurisdiction, "intend[ing]" specifically to mislead appellant and her attorney "to believe there was no jurisdictional" defect and to "lull [them] into a false sense of security" until cure should be impossible [AOB 15 [1]]. So doing, as the Amended Claim alleges---with the very purpose of making a trap of the statute of limitations---appellees violated the square holdings of the Weade, Zielinski and Denver cases [AOB 15, 18 and 20]. All of those decisions held that wilfully deceitful defendant pleadings concealing plaintiff errors as to the proper party to be sued erected an estoppel to bar the defendants so acting from taking profit from their own wrongful acts.

Appellees suggest these cases involved estoppel to deny agency and not estoppel as to the statute of limitations. The contrary is the case. Where the party seeking to raise the statute of limitations in those cases (the party mistakenly not originally sued) was a party to the wrongful conduct directly or through common insurance defense representation, estoppel to plead the statute of limitations was upheld.

Thus in the Weade case (Weade v. Trailways of New England,

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[1] Signifying Appellant's Opening Brief, page 15.

Inc. [C. A. D. C., 1963], 325 F. 2d 1000), where it was alleged that the party mistakenly not originally sued (the true corporate operator of the bus causing the accident) "conspired with" the defendant sued "to deceive by withholding from the District Court and from the plaintiff-appellant until well after the statute of limitations had run" the fact that the wrong party had been sued, it was ruled that a contention that the party not originally sued should be "estopped to plead the statute of limitations and should be added as a party defendant" "raise[d] substantial issues of fact and law" requiring a denial of a defense motion for summary judgment (325 F. 2d at p. 1000). The case was remanded with directions that the District Court "make findings of fact and conclusions of law as to the points mentioned." (325 F. 2d at p. 1001).

Again, in the Denver case (Denver v. Forbes [U. S. D. C. E. D. Pa., 1960], 26 F. R. D. 614), where common insurance defense representation was present, the party mistakenly not originally sued (the true driver of the car, who was the daughter of the party mistakenly named) was ordered substituted as party defendant without right to invoke the defense of the statute of limitations because of intentionally deceiving pleadings (26 F. R. D. at p. 616).

Thus, under the Weade, Zielinski and Denver cases, appellees' wilfully misleading pleadings estop their invocation now of the statute of limitations.

Moreover, even more compelling to the same end is appellees' purposeful breach of affirmative, clear legal duty in the

State Court pretrial proceedings to speak the truth, with clarity and candor, in defining and formulating "the factual and legal contentions to be made as to the issues remaining in dispute" under Rule 210(c) of the California Rules of Court. In those pretrial proceedings, while there yet remained ample time under the statute of limitations for appellant to cure the defect of exclusive federal jurisdiction by refiling in federal court, appellees, again for the very purpose of making a trap of the statute of limitations, intentionally formulated their "Separate Statement of . . . Issues Remaining In Dispute" [R. 40-41] to raise only negligence, contributory negligence, assumption of risk, proximate cause and damages, and to deliberately conceal and withhold any mention or claim of want of jurisdiction.

This was a fraud upon both court and opposing counsel. It was a misrepresentation, not a mere nonrepresentation. To say that the issues are A, B and C, when truly the issues (unknown to the court and opposing counsel but well known to the actor) include also D and D is a crucial and decisive issue (as is nonjurisdiction), is not merely to fail to speak but is affirmative misspeaking. And this appellees did in an area covered explicitly by the duty of Rule 210(c) to speak fully and fairly. Had appellees affirmatively said, "The issues are A, B, and C and there are no other issues.", the omission of issue D would clearly have been a misrepresentation. What they did say, in the premises of the duty under Rule 210(c) to define "the issues remaining in dispute", is in substance the very same misrepresentation and supports fully appellant's

claim grounded thereon of estoppel to later plead the statute of limitations.

II

UNDER BURNETT v. NEW YORK CENTRAL RAILWAY CO. APPELLANT'S CALIFORNIA STATE COURT ACTION TOLLED THE STATUTE OF LIMITATIONS AT BAR.

Appellant in her Opening Brief urged that under Burnett v. New York Central Railway Co. (1965), 380 U.S. 424, the State Court filing at bar tolled the statute of limitations because such filing put appellees on complete notice of appellant's claim of rights, thereby satisfying in full the policy objectives of a limitations period. The Burnett case was urged (1) as persuasive authority because of its policy expressions (AOB 32-35), and (2) as specific and direct authority because by a removal to Federal Court appellees could have permitted a final determination without need for issuance of new process as fully as the defendants in Burnett could have elected to waive their venue objections which without waiver required dismissal (AOB 32 and 35-38). On the second score appellees in their Reply Brief say transfer to the admiralty side could not be had upon removal even within the statute of limitations period, urging that Higa v. Transocean Airlines (C.A. 9, 1956), 230 F.2d 780, so holds and controls in this Circuit over appellant's cited cases, Devlin v. Flying Tiger Lines (U.S.D.C. S.D.N.Y., 1963), 220 F.Supp. 924 and Cunningham v. Bethlehem

Steel Co. (U.S.D.C.S.D.N.Y., 1964), 231 F.Supp. 934.

However, Higa expressly notes (230 F. 2d at p. 786, n. 1) that, "This court may so remand [to the admiralty docket from the law side] in an appropriate case.", and Twin Harbor Stevedoring Co. v. Marshall (C.A. 9, 1939), 103 F. 2d 513 and Kobilkin v. Pillsbury (C.A. 9, 1939), 103 F. 2d 667 so hold. Transfer from the law side to the admiralty side of the Federal Court can be freely made whenever appropriate, and the significance of the Devlin and Cunningham cases is that on removal from a state court in DOHSA [2] cases, if the removal is within the statute of limitations period the court will not require the "meaningless acts" of a dismissal and a refiling in the Federal Court but will retain jurisdiction. The transfer to Admiralty is merely a procedural step in accomplishing the objective of having the District Court retain jurisdiction. As the Court in Devlin states,

> "Since the state courts had no jurisdiction of the action, this court cannot acquire any by virtue of removal, even though the action could have been instituted here originally. Inasmuch as the action would be dismissed without prejudice to the filing of a libel in admiralty, and since the statute of limitations has not run to prevent the filing of such a new action, this court deems it pointless to go through meaningless acts. Accordingly, this case is transferred to the admiralty side of this court." (220 F.Supp. at p. 928.)

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[2] Signifying the Death on the High Seas Act.

The Cunningham case is in accord. The Higa case, cited by appellees, does not rule otherwise. There the Court denied transfer without a refiling in a DOHSA case first begun in the Federal Court on the law side, because in the case there involved the appellant raised no request for retaining jurisdiction and transferring to admiralty without a refiling until after his appeal and in a petition for rehearing. The Court ruled the appellant there could not thus "enlarge the scope of [his] appeal in a petition for rehearing", while noting expressly that "in an appropriate case" it could have ordered remand to the admiralty side of the court below without requiring a refiling (230 F. 2d at p. 786, including footnote 1).

III

THE LIMITATIONS PERIOD OF THE DOHSA AT BAR IS SUBJECT TO THE PRINCIPLES OF ESTOPPEL

At pages 20-22 of their Reply Brief Appellees cite and quote from five cases [Danzer & Co. v. Gulf Ry. Co. (1925), 268 U.S. 633; In Re Agwi Nav. Co. (C.A. 2, 1937), 89 F. 2d 11; Batkiewicz v. Seas Shipping Co. (1944), 54 F. Supp. 789; Petition of United States (1950), 92 F. Supp. 495 and Moran v. United States (1951), 102 F. Supp. 275] in support of a claim that, "For a cause of action not known at common law which is created by act of Congress, such as a cause of action under DOHSA, the limitation period is a 'condition of the right.' Expiration of the limitation

period extinguishes the cause of action" and estoppel, therefore, can never apply.

But all of appellees' cited cases [3] are old cases long predating Glus v. Brooklyn Eastern District Terminal (1959), 359 U.S. 231 which set the face of the law in an entirely new direction, repudiating the rationale urged by appellees and expressed in their cited authorities.

The Glus case involved an FELA complaint where estoppel was pled to escape the statute of limitations. The defendant urged that the FELA statute created rights unknown at common law and contained its own statute of limitations which constituted thereby "a condition precedent to recovery". The defendant urged that such "'built in' statutes of limitations in the Federal Employers' Liability Act, the Jones Act, the Suits in Admiralty Act, and similar statutes, will not be extended by disability to sue because of infancy or insanity or by delay occasioned by the defendant's fraud." (Glus v. Brooklyn Eastern District Terminal, opinion below, 154 F. Supp. 863, 865-866.)

The Supreme Court, noting there were "two lines of cases in sharp conflict" on the question, rejected the no-estoppel position

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[3] All of said cited cases are dicta as to the principle urged by appellees since none concerned estoppel as a basis for extending the limitations period. Danzer dealt with the constitutionality of a reviver statute; Agwi and Petition of United States held only that limitation of liability proceedings do not extend the limitations period; Batkiewicz held service is not necessary for a filing sufficient to toll the limitations period; and Moran found the DOHSA limitations period was extended as against the United States as a party by the Torts Claims Act.

urged by the defendant there and by appellees here. The Court ruled that despite the fact that "in FELA . . . the time limitation is an integral part of a new cause of action" estoppel could still be pled to escape a limitations bar. The Court said at pages 232-234:

> "Respondent contended that while estoppel often prevents defendants from relying on statutes of limitations it can have no such effect in FELA cases for there the limitation is an integral part of a new cause of action and that cause is irretrievably lost at the end of the statutory period. The District Court, after discussing two lines of cases 'in sharp conflict', [ruled estoppel inapplicable, and the Court of Appeals affirmed]. Since the question is important and recurring we granted certiorari.
>
> "To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations.
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> * * *
>
> "We have been shown nothing in the language or history of the Federal Employers' Liability Act to indicate that this principle of law [i.e., equitable estoppel], older than the country itself, was not to apply in suits under the statute. Nor has counsel made any convincing arguments which might lead us to make an exception to

> the doctrine of estoppel in this case."

In thus rejecting appellees' contention that estoppel cannot apply to "built in" statutes of limitations appearing within the terms of statutes creating new rights unknown at common law, the Supreme Court in Glus expressly noted and discounted the language relating thereto in appellees' chief cited case, Danzer & Co. v. Gulf Ry. Co., stating such language was "dicta [which] is neither binding nor persuasive." (359 U.S. at p. 235, n. 11.)

Subsequent decisions, including decisions of this Court, have noted and approved the broad and fundamental ruling of the Glus case as analyzed above.

Thus in United States v. Price-McNemar Construction Co. (C.A. 9, 1963), 320 F.2d 663, this Court at page 665 said:

> "As appellees point out, however, we are not here dealing with a general statute of limitations, but with a statute of limitations which is a part of, and pertains only to, an act creating a cause of action unknown at common law, namely, the Miller Act. Where this is the case, appellees contend, the period of limitation is a matter of substance limiting the right as well as the remedy. Accordingly, the argument goes, the commencement of such an action within the prescribed period is a condition precedent to recovery, and unless commenced within that period the district court is without jurisdiction over the subject matter.

> "This view, that the principles of estoppel against reliance upon statutes of limitation are not applicable to statutes that create a cause of action where none existed before and limit the time for commencing suit thereunder, has been rejected by the Supreme Court with regard to a statute of limitations contained in the Federal Employers' Liability Act. Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231. In reaching that conclusion, the Court cited earlier cases in which the rejected view was expressed, but stated the language of those cases 'is in dicta and is neither binding nor persuasive.' "

Again, in Security Insurance Co. v. United States (C.A. 9, 1964), 338 F.2d 444, this Court at page 448 said:

> "In Glus v. Brooklyn Eastern District Terminal, 1959, 359 U.S. 231, the Court held, in substance, that the three-year limitation applicable to actions under the Federal Employers' Liability Act was a statute of limitations, not a condition to suit, and that consequently fraud on the part of the defendant would extend the period within which the action could be brought. This case, we think, is in marked contrast to the attitude of the court in the Texas Portland Cement Company case, supra [233 U.S. 157]."

To like effect see also:

Burnett v. New York Central Railroad Co. (1965),
380 U.S. 424, 425 et seq.;

Iovino v. Waterson (C.A. 2, 1959),
274 F.2d 41, 50-51;

Northern Metal Co. v. United States (C.A. 3, 1965),
350 F.2d 833, 837-838.

Appellees suggest further that the statute at bar (DOHSA) shows an intent to eliminate estoppel as a basis for avoiding its limitations period because provision is made for extending the limitations period where there is "no reasonable opportunity for securing jurisdiction of the vessel, person or corporation sought to be charged". But inclusion of this provision to protect admiralty causes of action where, as is often the case, jurisdiction can only be achieved by attaching the vessel in rem and where absence of the vessel from jurisdictional waters frustrates timely attachment, indicates no true intent to exclude other extensions of the limitations period under the long established principles of equitable estoppel. In substance the statutory limitations provision at bar is indistinguishable from the limitations provisions concerned in the Glus and other decisions reviewed above holding estoppel principles are not excluded, and the statute here---in the absence of any express provision to the contrary---should likewise be construed to respect those estoppel principles which, in the language of the Glus decision are "older than the country itself." (359 U.S. at p. 234.)

CONCLUSION

WHEREFORE, for all of the reasons and considerations above stated and those expressed in Appellant's Opening Brief, it is respectfully submitted the judgment below should be reversed and the cause reinstated for trial.

Respectfully submitted,

MARGOLIS and McTERNAN

By: BEN MARGOLIS

Attorneys for Appellant

WILLIAM B. MURRISH
Of Counsel

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Ben Margolis

BEN MARGOLIS